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In the Supreme Court of the United States

OCTOBER TERM, 1976

THE PEOPLE OF THE STATE OF NEW YORK, PETITIONER

v.

KING BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK STATE COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES AS
AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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QUESTION PRESENTED

Whether the Double Jeopardy Clause forbids a second trial, and consequently an appeal by the prosecution, when an indictment is dismissed by the court in mid-trial at the request of the accused.

INTEREST OF THE UNITED STATES

The Criminal Appeals Act, 18 U.S.C. 3731, allows the United States to appeal in any criminal case from an order dismissing an indictment. This Court has concluded that the effect of the Criminal Appeals Act is to allow the United States to appeal from any order terminating a prosecution in favor of the accused, unless the Double Jeopardy Clause would prohibit further proceedings if the prosecution were to prevail on appeal. *United States*

v. *Wilson*, 420 U.S. 332, 336-339. Resolution of the question presented in this case—whether the Double Jeopardy Clause forbids further proceedings after an indictment has been dismissed in the middle of a jury trial at the behest of the accused—therefore would control the right of the United States to appeal under the Criminal Appeals Act no less than the right of a State to appeal under a statute, such as that of New York (N.Y. Crim. P. Law §§ 450.20 and 290.10 (McKinney 1971)), that explicitly provides for such appeals.

The United States believes that the issue presented in this case is currently the most important unresolved problem in the interpretation of the Double Jeopardy Clause. If judgments entered in mid-trial at the request of the accused—before submission of the case to the jury, with the attendant exposure of the defendant to risk of conviction—are insulated from review, defendants in substantial numbers of cases will receive what we believe to be unjustifiable windfall benefits. Because of the volume of federal criminal litigation, the United States has a pressing interest in the resolution of the question presented here.

DISCUSSION

The New York State Court of Appeals, perceiving itself to be "constrain[ed]" (Pet. App. 15a) by the decisions of this Court in *United States v. Wilson*, *supra*; *United States v. Jenkins*, 420 U.S. 358; and *Serfass v. United States*, 420 U.S. 377, has overruled one of its recent cases and held that the Double Jeopardy Clause forbids the State to appeal from an order dismissing an indictment entered in mid-trial at the request of the accused. It did so because it read *Wilson*, *Jenkins* and *Serfass* as creating an inflexible rule that, once jeopardy has attached in

a criminal prosecution and proceedings have terminated in favor of the accused, any further proceedings are forbidden by the Double Jeopardy Clause.¹

1. An inflexible rule such as that adopted by the court in this case cannot properly be distilled from prior decisions of this Court. Not only does the recent trilogy of opinions two Terms ago abstain from such an approach, but the approach is inconsistent with *Illinois v. Somerville*, 410 U.S. 458, in which a trial was terminated in the defendant's favor, after jeopardy had attached, by the dismissal of a defective indictment. True, the termination in *Somerville* was labelled a mistrial, but this Court has unequivocally rejected the notion that the label attached to the trial court's action is dispositive of the double jeopardy question. See *United States v. Sisson*, 399 U.S. 267, 290; *United States v. Jorn*, 400 U.S. 470, 478 n. 7; *Serfass v. United States*, *supra*, 420 U.S. at 392.

The issue of the appealability of mid-jury-trial terminations in favor of the accused is one of far-reaching practical importance, yet one which has been clouded by this Court's divergent approaches to double jeopardy problems in various cases. There is considerable tension in the doctrines that have been developed to resolve claims arising out of mid-trial terminations. In one line of cases, exemplified by *Somerville* and *Gori v. United States*, 367 U.S. 364, the Court has emphasized flexibility and practical considerations; it has inquired whether the accused has been deprived of an interest the Double Jeopardy

¹The New York court's feeling of constraint appears unwarranted in view of this Court's express reservation of questions such as that presented here. *Serfass*, *supra*, 420 U.S. at 394.

Clause was designed to protect and, if he has been, whether that deprivation was supported by manifest necessity. It has allowed second trials even though the first trial ended with a judgment in favor of the accused and even though, as in *Somerville*, the first trial was ended over the objection of the accused. Yet in another line of cases, exemplified by *Fong Foo v. United States*, 369 U.S. 141, the Court seemingly has followed an absolutist rule, stating that if the first trial ends with a decision in favor of the accused, a second trial is impermissible even if the decision was erroneous, was rendered at the specific request of the accused, and effectively removed the case from the consideration of the jury.

Wilson, *Jenkins* and *Serfass* can be read as belonging to either of these lines of cases. In our view the Court used the practical approach, for it allowed the prosecution to appeal in *Wilson* and *Serfass* from "judgments" (as opposed to "verdicts") terminating the case in favor of the accused. It did so even though the judgment in *Wilson* was entered after jeopardy had attached, and even though the judgment in *Serfass* was based upon the district court's resolution of the general issue. The Court explained these decisions, however, by pointing out that a decision in favor of the prosecution would not lead to further proceedings or to a second jeopardy in the district court, and in so doing it may be thought to have implied (although it did not say) that the possibility of further proceedings would in every case violate the Double Jeopardy Clause.

This latter implication cannot be reconciled with *Gori*, *Somerville*, *United States v. Dinitz* (No. 74-928, decided March 8, 1976), and the many other cases in which the Court has upheld the propriety of additional proceedings after the trial judge has aborted a trial and called the termination a mistrial. It is also irreconcilable with the

Court's numerous holdings that if a case proceeds to a verdict of guilty, and the court of appeals or some other court later sets aside the verdict because of a defect in the indictment or trial, the Double Jeopardy Clause does not bar a second trial. See, e.g., *United States v. Tateo*, 377 U.S. 463; *United States v. Ball*, 163 U.S. 662.

The tensions in the rationales advanced by the Court have produced several lines of cases in the lower courts reaching disparate results. Some of the cases consider the policies underlying the Double Jeopardy Clause and conclude that further trial proceedings would not be barred. See, e.g., *United States v. Kehoe*, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909 (allowing a second trial after an indictment was dismissed in mid-trial at the request of the accused). Others simply announce an inflexible rule that once a case has terminated in favor of the accused no further proceedings can be held. See, e.g., *United States v. Robbins*, 510 F. 2d 301 (C.A. 6), certiorari denied, 423 U.S. 1048. These cases are catalogued at Pet. 21-24, and (although we do not agree with the State's characterization of all of them) we believe that the conflict among the circuits and the state courts is an aggravated one and that the confusion is growing daily. Prompt resolution of the problem presented here is essential.

2. If the trial court in this case had declared a mistrial over respondent's objection, based on a defect in the indictment, a new trial would have been permitted under *Somerville* so long as the trial court's decision were arguably correct. If the trial court had denied respondent's motion to dismiss, the case had proceeded to verdict under an indictment later determined to be invalid, and the conviction therefore had been set aside on respondent's appeal or on collateral attack, a new trial would have been permitted under *Tateo* and *Ball*. These

results would be consistent with the entirely practical way the Court usually has interpreted the protections of the Double Jeopardy Clause. That jeopardy may attach before proceedings conclude in favor of an accused begins rather than ends the analysis (*Serfass, supra*, 420 U.S. at 390), and the defendant's right to be free of multiple trials must be weighed against (and at times subordinated to) other considerations of policy. See *United States v. Jorn, supra*, 400 U.S. at 484.

In our view, the substantial protections of the Double Jeopardy Clause are not called into question when an accused voluntarily surrenders his right to have the jury pass upon his guilt or innocence and instead asks the trial judge, who cannot convict him, to terminate the proceedings. In such cases there is no risk of conviction, no risk that a second prosecution will re-examine facts found in the first prosecution, no risk that a "verdict" in favor of the accused will be set aside. The careful balancing of interests carried out in *Dinitz, Somerville*, and like cases is no less appropriate when a trial ends in an order dismissing an indictment than when it ends in a mistrial.

The instant case is in fact stronger for the prosecution than *Somerville* was in one important respect: in *Somerville* the accused objected to termination of the trial and asserted his "valued right" to proceed to verdict before the jury then empaneled; here, by contrast, the trial ended in response to a motion filed by the accused himself. In such circumstances there would seem to be little reason for precluding a second trial if the termination of the first trial was erroneous. Otherwise a motion to terminate the trial would travel a one-way street, in which the accused could receive windfall benefits of errors in his favor without facing even the possibility of correction or conviction. The toleration of such errors is, to be sure, part of the constitutional scheme in certain circumstances, but that is so only when the accused

has faced the risk of conviction and the error comes to be embodied in a verdict by the authorized factfinder. An accused who moves in mid-trial to abort the proceedings does not receive the benefits of such a verdict, however, and has no interest in its finality; indeed, the advantage to the accused of such a mid-trial dismissal is precisely that it *avoids* the possibility that the jury will be allowed to consider the case and return a verdict.

3. Two other double jeopardy problems inspired by the tension in this Court's cases already are before the Court. Three petitions filed by the United States raise the question whether the prosecution can appeal from a post-verdict order suppressing evidence in a bench trial; the Tenth Circuit has held that because such orders "terminate" a case in favor of the accused, further proceedings are forbidden.² Two petitions filed by the United States raise the question whether the prosecution can appeal from an order dismissing an indictment entered after the jury has been unable to agree and a mistrial has been declared; the Fifth and Ninth Circuits have held, although for different reasons, that once one trial has been completed another cannot be held, even though the first trial ended in a mistrial, when the trial court's action between the first and second trials constituted a "termination" in favor of the accused.³ We believe that the error of the New York State Court of Appeals and the errors of the Fifth, Ninth and Tenth Circuits stem from a common misunderstanding of the nature of the protections afforded

²*United States v. Morrison*, No. 75-1534; *United States v. Rose*, No. 75-1535; *United States v. Kopp*, No. 75-1536.

³*United States v. Sanford*, No. 75-1867; *United States v. Martin Linen Supply Co.*, No. 76-120.

by the Double Jeopardy Clause and from an improper interpretation of *Wilson*, *Jenkins* and *Serfass*. We therefore believe that it would be advantageous for the Court to consider this Term all three questions concerning appeals by the prosecution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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